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Nos. 02-1845 & 03-83

In The
Supreme Court of the United States

AETNA HEALTH INC.,

Petitioner,

v.

JUAN DAVILA,

Respondent.

CIGNA HEALTHCARE OF TEXAS, INC.,

Petitioner,

v.

RUBY R. CALAD, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF COMMUNITY RIGHTS COUNSEL AND THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Community Rights Counsel (CRC) is a nonprofit, public interest law firm that assists state and local officials in defending community protections through the promotion of federalist principles. For example, CRC has submitted *amicus curiae* briefs on behalf of state and local officials arguing against overly expansive readings of the Fifth Amendment in cases involving state funding mechanisms for legal services for the poor, *see Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003), and protections for natural resources. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). More recently, CRC has filed *amicus* briefs with this Court in preemption challenges to state and local protections of public health and the environment. *E.g.*, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, No. 02-1343; *Eyl v. Ciba-Geigy Corp.*, No. 02-1500; *City of Lodi v. Firemen's Fund Ins. Co.*, No. 02-1169.

The Brennan Center for Justice at New York University School of Law is a nonpartisan organization that unites scholarship, public education, and legal action to find innovative and practical solutions to intractable problems in the areas of democracy, poverty, and criminal justice. Its Fair Courts Project, part of the Brennan Center's Democracy Program, addresses issues like

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have consented to the filing of *amicus* briefs in letters filed with the Clerk.

judicial independence, access to the courts, and the relationship among federal, state, and local power.

CRC and the Brennan Center have a strong interest in this case because it raises fundamental questions about the role of state courts in our federal system and their ability to address claims by their citizens who allege they have been wronged under state law.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Petitioners' submissions (Aetna Br. 40-50, Cigna Br. 42-50) contain considerable verbiage contending that our nation's health care system would be better off by eliminating state-law actions against managed care organizations for negligent "medical necessity" determinations. The Court need not resolve this complex policy issue here.

The question presented is jurisdictional: Who decides? Does § 502(a) of the Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a), prevent state courts from exercising jurisdiction over a suit filed under state law challenging a medical necessity determination and then deciding, subject to review by this Court, whether the action may proceed in the face of the express preemption provision in § 514? In other words, has Congress, through § 502(a), incapacitated the state courts from playing any role in resolving the preemption matter?

Someday, this Court might be called upon to decide, under principles of express and conflict preemption, whether ERISA preempts suits like those at issue here. But that question need not be answered in this case.

Indeed, in a separate ruling (nowhere mentioned in petitioners' merits briefs), the Fifth Circuit reluctantly concluded that it was bound by outdated circuit precedent to rule that § 514 does preempt such suits, precedent it now correctly believes has been severely undermined and should be reconsidered. Cigna Pet. App. 24a-28a. Yet the Fifth Circuit simultaneously held that the more demanding standards of removal under § 502 do not authorize complete preemption of such suits (*id.* at 7a-20a), thereby demonstrating the independence of these two matters. *Accord, Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 26-27 (1983) (holding that state-law actions can be preempted by ERISA but not subject to complete preemption under § 502).

At times, petitioners seem to suggest that every claim preempted by ERISA is subject to complete preemption and removal under § 502. *E.g.*, Cigna Br. 5-6. But *Franchise Tax Board* and this Court's other precedents demonstrate that this is emphatically untrue.

As shown in Section I below, complete preemption – a variant of what is commonly called the artful pleading doctrine – is a narrow exception to the well-pleaded complaint rule, which authorizes removal of a suit from state to federal court *only* where the action could have been brought in federal court under federal law. This Court has never found complete preemption outside the narrow context in which the plaintiff's claim was actually a claim that could have been filed under federal law. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), for example, the Court ruled that removal was proper under § 502 of ERISA where an employee sued in state court under state contract law for, among other things, breach of the applicable ERISA plan due to an improper processing

of benefits, a benefits claim that plainly could have been brought directly under ERISA in federal court.

In Section II, we show that respondents' claims could not have been filed under ERISA. Their complaints do not allege improper processing of benefits, and they do not seek benefits under the applicable ERISA plans. Instead, they seek appropriate damages under state law based on allegedly negligent medical necessity determinations, claims rooted in a state statute that is entirely independent from ERISA and in no way depends on an interpretation or application of respondents' ERISA plans. *Franchise Tax Board* is controlling, and because respondents' claims could not have been filed under ERISA, they are not subject to complete preemption.

ARGUMENT

This is a case about federalism, *i.e.*, the appropriate constitutional role of the States in our federal system. By so stating, we do not mean to minimize respondents' plight. They allege they suffered serious physical injury and unnecessary pain due to medical necessity decisions by petitioners that did not meet the basic standard of ordinary care under the Texas Health Care Liability Act.

The issue at hand, however, should turn on this Court's respect for the authority and responsibility of state courts to address such claims. As Justice Black famously put it, Our Federalism requires "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left

free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

Although Our Federalism implicates a wide array of legal doctrines, scholars recognize that the proper limitation of preemption is one of the most important aspects of federalism because preemption directly affects the States' ability to provide services and beneficial regulation to their citizens. *See* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1377-80 (2001). In the same vein, Justice Breyer recently concluded:

> [T]he true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress' commerce power at its edges, or to protect a State's treasury from a private damages action, but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.

Egelhoff v. Egelhoff, 532 U.S. 141, 160-61 (2001) (citations omitted) (Breyer, J., joined by Stevens, J., dissenting); *cf. Geier v. American Honda Motor Co.*, 529 U.S. 861, 887 (2000) (Stevens, J., joined by Souter, Thomas, & Ginsburg, JJ., dissenting).

Sensitive issues of federalism are especially evident in cases like this one that involve the artful pleading doctrine because they are predicated on federal-question jurisdiction under 28 U.S.C. § 1331, which "masks a welter of issues regarding the interrelationship of federal and state authority." *Franchise Tax Board*, 463 U.S. at 8. While a proper interpretation of § 502 certainly implicates a "mass of technical detail," affirmance here is compelled by both a straightforward application of principles governing

removal and a proper respect for the appropriate role of state courts in our federal system.

In assessing the propriety of removal of a case from state to federal court, a "State's dignitary interest bears consideration." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 576 (1999); *accord*, *Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments * * * requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined."). The mere notice of removal strips the state court of jurisdiction to take any further action in the case, subject only to the discretion of a federal district judge. *See* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1087-88 (1994) ("A state court that has a case snatched from its docket has a legitimate cause for offense. More than insult, this is injury – a result that renders fruitless a previous investment of scarce resources.").

We show below that the Fifth Circuit paid proper respect to the appropriate role of state courts in our federal system by concluding that respondents' claims do not arise under ERISA and thus are not removable to federal court.

I. A STATE-COURT ACTION RAISING ONLY STATE-LAW CLAIMS THAT CANNOT BE PURSUED UNDER ERISA DOES NOT "ARISE UNDER" ERISA FOR PURPOSES OF REMOVAL.

The standards for removing a case to federal court are more than a century old. A state-court action may be removed to federal court only if it qualifies as a "civil

action * * * of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Removal is "entirely a creature of statute," *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 28 (2002), and "these statutory procedures for removal are to be strictly construed." *Id.* at 32.

The only possible basis for removal in this case is federal-question jurisdiction, which gives district courts the authority to preside over "[a]ny civil action * * * founded on a claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1441(b); *see also* 28 U.S.C. § 1331. The presence or absence of federal-question jurisdiction depends on an examination of the "well-pleaded" allegations on the face of a state court complaint. *See Beneficial Nat'l Bank v. Anderson*, 123 S. Ct. 2058, 2062 (2003); *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112-113 (1936). Defenses, including a defense based on the preemptive effect of federal law, do not provide a basis for federal-question jurisdiction. *See Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 14 (1983) ("a case may not be removed to federal court on the basis of a federal defense * * * even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.").

Thus, complaints such as those filed by respondents, which raise only state-law claims, generally cannot be removed from state to federal court. Removal here depends on the "artful pleading" doctrine and a subspecies of that doctrine known as "complete preemption." *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) ("The artful pleading doctrine allows removal where federal law

completely preempts a plaintiff's state-law claim."). The doctrine of complete preemption, or more accurately removal preemption,[2] originated in Justice Douglas's opinion for the Court in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), which stands for the proposition that the preemptive force of certain federal statutes is sufficient to displace entirely state-law actions that, in substance, assert claims maintainable under federal law. Thus, in *Avco*, the Court permitted removal of a state-law claim for violation of a contract between an employer and a labor organization on the ground that these claims could be brought only under § 301 of the Labor Management Relations Act (LMRA). As the Court explained last Term in *Beneficial National Bank*, "[w]hen the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." 123 S. Ct. at 2062.

The standard for permitting removal based on the artful pleading doctrine is distinct from, and more demanding than, the question of whether ERISA preempts state law. As the *Franchise Tax Board* Court explained, "[m]erely to hold that ERISA does not have the same effect on appellant's suit in this case that § 301 of LMRA had on the petitioner's contract suit in *Avco* is not to prejudge the merits of [the] preemption claim." 463 U.S. at 27; *id.* at 26 (rejecting removal even though "the Court of Appeals may

[2] Courts use the terms "complete preemption" and "removal preemption" interchangeably. *See Russell v. Sprint Corp.*, 264 F. Supp. 2d 955, 961 (D. Kan. 2003). We do so as well.

well be correct that ERISA precludes enforcement of the State's levy in the circumstances of this case").

To date, this Court has permitted removal under the complete preemption doctrine only where at least one claim brought in state court paralleled a federal claim and thus could have been brought originally in federal court. In *Avco*, for example, the employer's state-law claim sought to enforce a no-strike clause of a collective bargaining agreement, a claim at the very heart of the area preempted by § 301 of the LMRA. Similarly, in *Metropolitan Life*, this Court's only case to date that allows removal under ERISA, the claimant sought, among other relief, "money contractually owed" under the terms of Metropolitan Life's ERISA plan. 481 U.S. at 61. The *Metropolitan Life* Court permitted removal of the state-law contract claim because the claim was "by a beneficiary to recover benefits from a covered plan," an action that "falls directly under § 502(a)(1)(B) of ERISA, which provides an exclusive federal cause of action for resolution of such disputes." *Id.* at 62-63. Because the contractual claim for ERISA benefits supported removal, the *Metropolitan Life* Court had ample authority to exercise jurisdiction over the plaintiff's other contract and tort claims without an independent analysis of whether those claims would support removal. *See* 28 U.S.C. § 1441(c).

Other precedents confirm that removal preemption is limited to claims that could have been brought under federal law notwithstanding the complaint's failure to refer to that law. *Compare Beneficial Nat'l Bank*, 123 S. Ct. at 2063 (permitting removal of a state-law claim against a national bank because the complaint "expressly charged petitioners with usury," a claim that could have been filed under federal law), *with Caterpillar Inc. v.*

Williams, 482 U.S. 386, 397 (1987) (rejecting removal under § 301 of the LMRA where the claim was based on an alleged individual employment contract that pre-existed a collective agreement and thus could not have been filed under § 301).

The Court's unanimous ruling in *Rivet* explains why removal on the basis of complete preemption is appropriate only where the state-law claims at issue could actually be brought in federal court. In *Rivet*, Regions Bank attempted to remove a state-law claim to federal court on the ground that the claim was precluded as a matter of federal law by an earlier federal court ruling. The Court rejected this proposed extension of the artful pleading doctrine, expressly distinguishing complete preemption cases:

> A case blocked by the claim preclusive effect of a prior federal judgment differs from the standard case governed by a completely preemptive federal statute in this critical respect: The prior federal judgment does not transform the plaintiff's state-law claims into federal claims but rather extinguishes them altogether. Under the well-pleaded complaint rule, preclusion thus remains a defensive plea involving no recasting of the plaintiff's complaint, and is therefore not a proper basis for removal.

522 U.S. at 476-77 (citation omitted).

The rule of *Rivet* is that the artful pleading exception to the well-pleaded complaint doctrine is viable only where the state-court claim could actually be maintained under federal law. Where a claim cannot be brought under federal law, a successful defense that a state claim is preempted by federal law would extinguish the claims

altogether. In such cases, preemption involves no recasting of the plaintiff's complaint, and there is no proper basis for removal.

II. RESPONDENTS' ACTIONS CANNOT BE PURSUED UNDER ERISA.

Section 502(a)(1)(B) authorizes suits by ERISA plan participants and beneficiaries to recover benefits due under the plan, and to enforce and clarify rights under the plan. 29 U.S.C § 1132(a)(1)(B). Through their state court lawsuits, respondents seek none of these things. Their claims are rooted in a state statutory duty of ordinary care that is entirely independent of ERISA and the obligations imposed thereunder. The elements respondents must establish to prevail on their claims and obtain the relief they seek have nothing to do with the enforcement of ERISA rights or the collection of plan benefits.

Respondents thus stand in stark contrast to the plaintiff in *Metropolitan Life*, who alleged an "improper processing of a claim for benefits" (481 U.S. at 60) and sought "reimplementation of all benefits and insurance coverages" (*id.* at 61). Similarly, the complaint in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), expressly challenged a termination of disability plan benefits, and the complaint requested "[d]amages for failure to provide benefits" under an ERISA plan. *Id.* at 43.[3] Respondents

[3] Although petitioners rely heavily on *Pilot Life*, that case did not involve removal preemption under § 502, but instead express preemption under § 514. To be sure, *Pilot Life* discusses § 502 in the course of analyzing preemption under § 514, but only because the claim sought relief due to an allegedly improper denial of benefits, a claim that could

(Continued on following page)

neither allege improper processing nor seek reinstatement of benefits. Thus, their claims do not arise under ERISA.

The Court's unanimous ruling in *Franchise Tax Board* is controlling on this point. There, a California tax authority filed suit in state court to enforce a tax levy against funds held in trust pursuant to an ERISA-covered employee benefit plan, and for a declaration that the trustees were required to honor future levies. The trust removed to federal court, arguing that under *Avco,* California's claims were "in substance" federal claims because they were within the scope of, and thus removable under, § 502. 463 U.S. at 22. The Court rejected this argument, holding that the claims were not within the scope of § 502. *Id.* at 22-28.

In analyzing the levy enforcement claim, the Court anticipated its subsequent ruling in *Metropolitan Life*, acknowledging that "[i]t may be that * * * any state action coming within the scope of § 502(a) of ERISA would be removable to federal district court, even if an otherwise adequate state cause of action were pleaded without

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have been brought directly under § 502. *See Pilot Life*, 481 U.S. at 43 (articulating the question presented as whether ERISA preempts state actions "asserting improper processing of a claim for benefits under an insured employee benefit plan" and describing the claims as seeking "[d]amages for failure to provide benefits under the insurance policy"); *id.* at 51-52 (concluding that § 502 was relevant to the § 514 issue "[b]ecause in this case, the state cause of action seeks remedies for the improper processing of a claim for benefits under an ERISA-regulated plan."); *id.* at 57 (concluding "that Dedeaux's state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved by § 514(b)(2)(A), and therefore is pre-empted by § 514(a)."). As shown herein, respondents' claims under the Texas Health Care Liability Act are independent of ERISA and could not have been brought under § 502. *Pilot Life* is thus plainly distinguishable.

reference to federal law." 463 U.S. at 24. The Court went on to make clear, however, that such a ruling would not mean that any claim seeking funds from, or otherwise related to, an ERISA plan would justify removal.

Specifically, the *Franchise Tax Board* Court cast the complete preemption issue as whether California's claims were, "in substance," ERISA claims notwithstanding the state's failure to plead an ERISA claim. *Id.* at 22. This issue reduced to an inquiry into whether California had tried to "defeat removal by omitting to plead *necessary* federal questions in [its] complaint." *Id.* (emphasis added). After examining § 502 in detail, the Court concluded that California had not omitted any necessary federal questions because "on the face of a well-pleaded complaint there are many reasons completely unrelated to the provisions and purposes of ERISA why the State may or may not be entitled to the relief it seeks." *Id.* at 26. For example, the Court observed that "[i]n theory (looking only at the complaint), it may turn out that the levy was improper under state law, or that in fact the defendant had complied with the levy." *Id.* at 26 n.29. The Court distinguished *Avco* by stressing that "[u]nlike the contract rights at issue in *Avco,* the State's right to enforce its tax levies is not of central concern to the federal statute," even though California's levy suit sought to raid the coffers of an ERISA-sponsored plan. *Id.* at 25-26.

In the same way, respondents' complaints do not omit "necessary" federal questions because their state statutory claims against petitioners do not require interpretation of ERISA or their ERISA plans. As in *Franchise Tax Board*, respondents' claims might well fail or succeed for reasons entirely independent of ERISA, including a failure to prove the requisite elements of a claim under the Texas

Health Care Liability Act, elements that have no cognates in a § 502 claim. And as in *Franchise Tax Board*, respondents' suits as pleaded do not "arise under" ERISA simply because respondents are subject to ERISA plans administered by respondents. Nor is the Texas state statutory duty of medical care a central concern of ERISA. *See* pages 16-18, below (discussing *Pegram*). Of course, to apprehend the basic nature of respondents' claims, the Texas courts on remand would need to acknowledge the obvious fact that respondents are challenging medical necessity determinations. But this is no different from *Franchise Tax Board*, where a basic understanding of California's claim required acknowledgment that its levy was asserted against an ERISA plan whose members included delinquent taxpayers. In neither case would a court need to interpret and apply the plan to resolve the claim.

Another passage of the *Franchise Tax Board* opinion drives this conclusion home. In footnote 28 and the accompanying text, the Court contrasted § 502 of ERISA with § 301 of the LMRA, interpreted in *Avco,* and determined that § 301 is more encompassing with respect to suits related to employment contracts than § 502 is with respect to ERISA plans. *Id.* at 25 n.28. It nonetheless concluded that "even under § 301, we have never intimated that any action merely relating to a contract within the coverage of § 301 arises exclusively under that section." *Id.* For example, "a state battery suit growing out of a violent strike would not arise under § 301 simply because the strike may have been a violation of an employer-union contract." *Id.* at 25 n.28. In the same way, a state tort suit challenging the negligent act of a managed health care organization

does not arise under ERISA simply because the injured employee is subject to an ERISA plan.

To be sure, in analyzing California's declaratory judgment action, the *Franchise Tax Board* Court provided a second basis for distinguishing *Avco* and ruling against removal, namely that § 502 provides a cause of action only to plan participants, beneficiaries, and fiduciaries, not to the State of California. *Id.* at 26-27. Although this ground for finding no removal would not apply to respondents here, the Court's analysis makes clear that removal is inappropriate where either one of the distinguishing features exists, *i.e.*, either where the state action is independent from ERISA or where the plaintiff is not a plan participant, beneficiary, or trustee. *Id.*

Franchise Tax Board, which receives only a single passing reference by petitioners (Aetna Br. 23-24), is fully consistent with *Metropolitan Life*. As mentioned above, *Franchise Tax Board* expressly anticipated the *Metropolitan Life* ruling, handed down just four years later. Last Term, this Court reaffirmed both *Franchise Tax Board* and *Metropolitan Life*. *See Beneficial Nat'l Bank*, 123 S. Ct. at 2062-63 (relying on *Franchise Tax Board*, *Avco*, and *Metropolitan Life* to "provide[ ] the framework" for analyzing removal preemption). Taken together, these rulings instruct federal district courts (1) to allow removal where a state-court action seeks to enforce or clarify rights under an ERISA plan and thus could have been filed in federal court under § 502 (notwithstanding the absence of any reference to ERISA), and (2) not to remove state court actions that do not seek to clarify obligations arising

directly from an ERISA plan, but rather attempt to vindicate rights from an independent source that would not require interpretation of ERISA or an ERISA plan.[4]

The distinct nature of respondents' suits under the Texas Health Care Liability Act is confirmed by the Court's unanimous ruling in *Pegram v. Herdrich*, 530 U.S. 211 (2000). We will not burden the Court with another lengthy description of this case. But it bears repeating that *Pegram* concludes that Congress did not intend to federalize state-law malpractice claims by allowing them to be brought as fiduciary claims under § 502(a)(2). *Id.* at 236. This conclusion has direct relevance to the removal issue under § 502, for as the U.S. Court of Appeals for the Eleventh Circuit determined, "it makes little sense to

[4] *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), a LMRA preemption case, reinforces this argument. The *Lingle* Court held that § 301, which preempts suits arising out of union contracts, did not preempt a state-tort claim for wrongful termination, even though the union contract at issue limited discharges to "just cause." *Id.* at 406-13. The *Lingle* Court invoked state anti-discrimination laws as a helpful analogy to support its conclusion that Lingle's retaliatory discharge claim was independent from, and thus not preempted by, any potential claim for violation of the contract:

> [T]he mere fact that a broad contractual protection against discriminatory – or retaliatory – discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state law violation dependent upon the terms of the private contract. For even if an arbitrator should conclude that the contract does not prohibit a particular discriminatory or retaliatory discharge, that conclusion might or might not be consistent with a proper interpretation of state law.

Id. at 412-13. Likewise, a ruling by a state court on respondents' claims would rely exclusively on state statutory law and be entirely independent from obligations arising under ERISA.

believe that Congress did not intend to federalize malpractice claims under section 502(a)(2) [as held in *Pegram*], but intended to do so under section 502(a)(1)(B)" by requiring that such claims be brought exclusively in federal court as an ERISA claim to recover benefits. *Land v. CIGNA Healthcare of Fla.*, 339 F.3d 1286, 1293 (11th Cir. 2003), *petition for cert. filed* (No. 03-649, Oct. 28, 2003).

Petitioners seek to distinguish *Pegram* by noting that the treating physicians there owned the defendant-HMO and thus made the mixed eligibility-treatment decisions alleged to have been negligent. But the *Pegram* Court made clear that its analysis turned not on who made the decisions, but instead on the nature of the decisions being made:

> [Treatment and eligibility] decisions are often practically inextricable from one another. * * * This is so not merely because, under a scheme like [the HMO at issue], treatment and eligibility decisions are made by the same person, the treating physician. *It is so because a great many and possibly most coverage questions are not simple yes-or-no questions* * * * .

Id. at 228 (emphasis added; citation and footnote omitted). In practical terms, the Court continued, such eligibility decisions cannot be untangled from judgments about reasonable medical treatment. *Id.* at 229. This is true regardless of whether that decision is made by a treating physician who owns and operates an HMO, or by a desk nurse who exercises discretion on behalf of an HMO. Indeed, the Court stressed that its conclusion in this regard was not a narrow one limited to the relatively rare physician-owned HMO context, but instead extended to "countless medical administrative decisions [made] every day." *Id.*

Although *Pegram* is not directly controlling on removal, several federal appeal courts have received its message loud and clear, ruling that medical malpractice claims filed in state court are not claims arising under ERISA and thus are not subject to removal. *E.g.*, *Land*, 339 F.3d at 1289-94 (malpractice action filed in state court alleging that an HMO's failure to diagnose the plaintiff's condition correctly and authorize the proper treatment does not arise under ERISA and thus is not subject to removal); *Cicio v. Does*, 321 F.3d 83, 102 (2d Cir. 2003) (state-law malpractice action challenging a mixed eligibility/treatment decision does not arise under ERISA and is not removable to federal court), *petition for cert. filed* (No. 03-69, July 11, 2003)).

At bottom, the removal issue boils down to a proper notion of "artful pleading." *Franchise Tax Board*, *Metropolitan Life*, and this Court's other precedents governing removal preemption emphasize that the artful pleading prohibited by § 502 occurs where a plaintiff seeks to recover benefits due to a violation of an ERISA plan, but files a complaint based exclusively on state contract law without reference to ERISA. On those facts, the very contract being breached is an ERISA plan, and the state-law contract claim implicates the same evidence and legal analysis – including, notably, construction of the plan – that would attend a claim for benefits under § 502. Under those circumstances, the breach of contract claim really *is* an ERISA claim, and the plaintiff is not permitted to artfully plead around § 502's exclusive remedy scheme for the collection of benefits.

Petitioners essentially contend that § 502 prevents injured patients from filing in state court under state law *any* complaint against a plan administrator, regardless of

whether the patient seeks to recover plan benefits, or otherwise enforce or clarify rights and obligations under the plan. Their position is that *any* challenge to their allegedly negligent medical necessity decisions must be brought under § 502, regardless of whether resolution of the claim would involve an interpretation of ERISA or the applicable plans. Under this theory, even a state-law discrimination claim challenging a denial of benefits would be removable (*compare Lingle*, discussed in note 4, *supra*). This radical expansion of removal preemption finds no support in precedent and would constitute a frontal assault on the proper role of state courts in our federal system.[5]

CONCLUSION

To understand the scope and propriety of the Fifth Circuit's ruling, it is critical to distinguish the more demanding standards for removal under § 502 from those

[5] In *Beneficial National Bank*, Justice Scalia, joined by Justice Thomas, argued vigorously in dissent against the application of removal preemption beyond the limited facts of *Avco* and *Metropolitan Life*, calling the *Avco* ruling an "unprecedented act of jurisdictional alchemy." 123 S. Ct. at 2066 (Scalia J., dissenting). Petitioners' proposed expansion of removal preemption represents a far greater threat to state-court authority than that at issue in *Beneficial National Bank* because, in that case, the state-law usury claims were unquestionably preempted and thus there were "good reasons" based in policy to permit removal jurisdiction. *Id.* at 2069. Here, this Court's rulings in *Pegram* and other recent cases raise serious questions about whether state medical malpractice claims are preempted by ERISA. Comity concerns dictate that state courts be permitted to address this important question in the first instance, subject to this Court's review.

for ERISA preemption generally. Petitioners and their supporting *amici* conflate the issues.[6] The Fifth Circuit correctly concluded that respondents' claims do not arise under ERISA and thus are not removable under § 502. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[6] To cite one more example, we are befuddled by the Justice Department's assertion that the "court of appeals held that respondents' claims are not completely preempted – indeed, are not preempted at all * * * ." *See* U.S. Br. 17. It is simply wrong to suggest that the Fifth Circuit held that respondents' claims "are not preempted at all." After deciding it lacked jurisdiction over Calad and Davila's claims, the court did the only thing it could do: it left the substantive preemption issue for resolution by the Texas courts on remand. With respect to Robert Roark, as noted above, the court felt bound by outdated circuit precedent and reluctantly held that similar state-law claims *are* preempted by § 514. *See* Cigna Pet. App. 24a-28a. The Justice Department's misstatement of the Fifth Circuit's holding, coupled with petitioners' silence regarding the lower court's ruling in their favor on the substantive preemption issue, serve to obscure the critical distinction between removal preemption under § 502 and express preemption.